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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARY JEAN FEATHERSON, Plaintiff and Appellant, v. GARY A. FARWELL, Defendant and Respondent.	B169057 (Los Angeles County Super. Ct. No. BC283739)

APPEAL from a judgment of the Superior Court of Los Angeles County, Owen L. Kwong and Dan T. Oki, Judges. Affirmed.

Andrews & Hensleigh and Joseph Andrews for Plaintiff and Appellant.

Robie & Matthai, Edith R. Matthai and Natalie A. Kouyoumdjian for Defendant and Respondent.

Although a lawyer retained to provide testamentary legal services to a testator or grantor may also have a duty to act with due care for the interests of intended third-party beneficiaries, the lawyer's primary duty is owed to his client and his primary obligation is to serve and carry out the client's intentions. Where, as here, there are questions about the client's intent or capacity to favor one adult child over another, the lawyer will not be held accountable to either child -- because any other conclusion would place the lawyer in an untenable position of divided loyalty. We affirm a judgment of dismissal.

FACTS

A.

While hospitalized for exploratory surgery during October 1997, Marie Featherson (the widowed mother of three adult children) allegedly summoned her lawyer, Gary Farwell, to the hospital and asked him to prepare a deed transferring her residence to one of her daughters, Mary Featherson. Farwell prepared a grant deed with a life estate retained by Marie, which Marie allegedly signed and Farwell notarized. Farwell took the deed with him when he left the hospital but did not send it to the recorder's office until June 1998. The deed was returned to him on July 13 without recording because the notary seal was illegible. Farwell imprinted a new seal and (on July 15) returned the deed to the recorder's office. Meanwhile, Marie had died on June 17, 1998. The deed was recorded on August 20, 1998.

B.

Marie's son, Charles Featherson, was the personal representative of Marie's estate. In September 1998, Farwell wrote to Charles, explaining the circumstances of the deed's recordation and adding, "No chicanery was

involved in the preparation or recording of the deed. It was held in my office from October [1997] to June [1998] *to protect Marie Featherson's interests*." (Italics added.)

In November 1999, Charles filed a petition in which he asked the probate court to direct Mary to transfer Marie's residence to the estate. Mary objected, contending Marie had executed the deed and delivered it to Farwell with instructions to have it recorded. Charles disputed Mary's allegations, claiming the deed had been given to Farwell for safekeeping, and that Marie never intended to deliver the deed to Mary. The issue was tried to the probate court in December 2000.

Farwell testified that he prepared the deed at Marie's request, that no one else was present when Marie signed it, that Marie was in pain but knew what she was doing, and that he was '"just being overly cautious on [his] own"' when he chose not to immediately record the deed, notwithstanding her instructions to him, and that he was '"being overly protective of [his] elderly client and because [he had] seen her in the hospital."' Mary testified that, at Marie's request, she had called Farwell to tell him that Marie wanted him to prepare a power of attorney and a "joint tenancy will," that she was in her mother's hospital room when the deed was executed, and that she heard her mother instruct Farwell to record the deed.

Charles testified that he was at the hospital every day and night, including the day the deed was allegedly executed, and that he did not see either Farwell or Mary on that date. He also testified that, while hospitalized and again after her discharge, Marie spoke to him about the property and said she

intended to sell it so she could divide the proceeds among her children. Charles's wife, Freddie Featherson, confirmed Charles's version of the events, and also testified that on the day Marie purportedly told Farwell she wanted to transfer the property to Mary, Marie could not speak at all because she had a tube in her throat. Brenda Featherson (Mary's and Charles's sister) testified that her mother told her she had "signed everything over to Mary" but also testified that Marie was unable to talk at the time the deed was prepared and signed. A neighbor testified that Marie's primary concern was for Bobby, her disabled nephew.

The probate court granted Charles's petition, resolving the conflicts in the evidence against Mary. The court found the evidence insufficient to prove that Marie had "an immediate present intent to convey the property" to Mary, and specifically noted Farwell's testimony that he felt obligated to retain the deed until he could talk to Marie after her release from the hospital. Mary appealed from the probate court's order, claiming there was sufficient evidence to prove Marie's present intent to transfer the property to Mary. Division Five of our court disagreed, explaining that delivery or the absence thereof is a question of fact, and noting the significant contradictions in the evidence, all of which had been resolved against Mary. The probate court's order was affirmed. (*Estate of Marie Featherson, Deceased* (Mar. 26, 2002, B149901 [nonpub. opn.].)

C.

In October 2002, Mary filed this action against Farwell, alleging that he was negligent in failing to record the deed before Marie's death and claiming his negligence caused Mary to lose the property in the probate proceeding. Farwell's demurrer was sustained with leave to amend, and Mary filed a first

amended complaint, this time claiming Farwell owed her a duty as a third-party beneficiary of the services Farwell rendered to Marie. Farwell again demurred and asked the court to judicially notice Division Five's opinion affirming the probate court's judgment against Mary, contending his duty was owed to Marie, not Mary, and that (assuming duty) he was not the cause of any damage to Mary.

The trial court granted Farwell's request for judicial notice and sustained his demurrer without leave to amend, and this appeal by Mary is from the judgment thereafter entered.

DISCUSSION

The trial court found that Farwell represented Marie, not Mary, and thus did not owe a duty to Mary. Mary contends the trial court erred. We disagree.

A.

In her first amended complaint, Mary alleges that Farwell "agreed and undertook to represent . . . Marie . . . as her attorney[]," that Farwell prepared the deed at Marie's request, and that by "executing the Deed and in instructions to [Farwell], [Marie] expressed the intent that [Mary] would be the beneficiary of the legal services to be performed by [Farwell] in connection with the execution and recording of the Deed. [Farwell] had knowledge that in his representation of [Marie], [Mary] was an intended third-party beneficiary to the attorney-client relationship between [Marie] and [Farwell]. . . . Farwell knew that [Mary] was the beneficiary to the deed executed by [Marie]. Also, . . . Farwell knew that [Marie] intended [Mary] to receive title to the house to be able to continue to

care for Bobby Featherson . . . . [Farwell] owed [Marie], and [Mary] as the intended third party beneficiary of his legal and notary services to [Marie], a duty to use his skill, prudence, and diligence as other members of the profession commonly possess and exercise. [Farwell] breached and failed to uphold this duty owed to [Marie] and to [Mary]."

B.

"It is an elementary proposition that an attorney, by accepting employment to give legal advice or to render legal services, impliedly agrees to use ordinary judgment, care, skill and diligence in the performance of the tasks he undertakes [citation]. In elaborating on this duty, the cases have repeatedly held that an attorney who assumes preparation of a will incurs a duty not only to the testator client, but also to his intended beneficiaries, and lack of privity does not preclude the testamentary beneficiary from maintaining an action against the attorney based on either the contractual theory of third party beneficiary or the tort theory of negligence." (*Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 903; *Lucas v. Hamm* (1961) 56 Cal.2d 583, 589-591; *Heyer v. Flaig* (1969) 70 Cal.2d 223, 226-229; *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1294-1295.)[1] But the lawyer's liability to the "intended beneficiary" is not automatic or absolute, and there is no such liability where the testator's intent or capacity are questioned.

In *Biakanja v. Irving* (1958) 49 Cal.2d 647, the sole beneficiary under a will, who lost her bequest because the defendant, a notary public, failed to have

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[1] Although the document at issue in our case is a deed rather than a will, the difference lacks legal relevance because it is undisputed that the deed was drafted by Farwell to carry out his understanding of Marie's testamentary plan.

the will properly attested, had a claim against the decedent's lawyer because the '"end and aim"' of the will -- to provide for the named beneficiary -- was undisputed. (*Id.* at pp. 650-651.) In *Lucas v. Hamm, supra,* 56 Cal.2d 583, the beneficiaries under a will, who lost their bequests because the lawyer failed to avoid the operation of the rule against perpetuities, had a claim against the testator's lawyer because there was no question at all about the testator's intent or capacity. In *Heyer v. Flaig, supra,* 70 Cal.2d 223, where the lawyer's failure to advise the testatrix of the legal consequences of her intended marriage caused the testatrix's daughters to lose their intended legacies, and there was no doubt whatsoever about the testatrix's capacity or intent, the daughters could pursue a claim against their mother's lawyer. In each of these cases, the court was satisfied that the lawyer should be responsible to a third person because the transaction was plainly intended to benefit that person, the harm to that person was foreseeable, there was a reasonable degree of certainty that the third person suffered injury as a result of the lawyer's conduct, and the policy of preventing future harm outweighed the burden placed on the lawyer by the imposition of this additional liability. (See *Lucas v. Hamm, supra,* 56 Cal.2d at p. 588.)

But liability to a third party will not be imposed where there is a question about whether the third party was in fact the *intended* beneficiary of the decedent, or where it appears that a rule imposing liability might interfere with the attorney's ethical duties to his client or impose an undue burden on the profession. In *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, where a lawyer prepared a new will for a client naming her husband as a beneficiary but the client died without executing the will, the husband could not sue the lawyer for failing to carry out the decedent's wishes in a reasonably prompt and diligent

fashion -- because the "imposition of liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent." (*Id.* at p. 965.) In *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, supra,* 109 Cal.App.4th at page 1302, the court held that a lawyer does not have a duty to the beneficiaries under a will to evaluate and ascertain the testamentary capacity of a client seeking to amend his will or to make a new will. In *Ventura County Humane Society v. Holloway, supra,* 40 Cal.App.3d 897, a lawyer who drafted a will with a substantial bequest to a nonexistent animal rights organization ("Society for the Prevention of Cruelty to Animals (Local or National)") might have breached a duty to the testator but he owed no duty to the Ventura County Humane Society to establish the true intention of the testator. (See also *Hiemstra v. Huston* (1970) 12 Cal.App.3d 1043, 1046; and see *Boranian v. Clark* (2004) ___ Cal.App.4th ___ (No. B165402), filed concurrently with this opinion.)

C.

In resolving the issue now before us, we emphasize the basic principle that, while out of an agreement to provide legal services to the testator, a duty also arises to act with due care with regard to the interests of the intended beneficiary, *the scope of duty owed to the beneficiary is determined by reference to the attorney-client relationship*. The primary duty is owed to the testator-client, and the attorney's paramount obligation is to serve and carry out the intention of the testator. Where, as here, the extension of that duty to a third party could improperly compromise the lawyer's primary duty of undivided loyalty by creating an incentive for him to exert pressure on his client to complete her estate planning documents summarily, or by making him the arbiter of a dying client's true intent, the courts simply will not impose that

insurmountable burden on the lawyer. (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray, supra,* 109 Cal.App.4th at p. 1298; *Radovich v. Locke-Paddon, supra,* 35 Cal.App.4th at p. 965; *Ventura County Humane Society v. Holloway, supra,* 40 Cal.App.3d at pp. 904-905.)

Farwell's duty was to Marie, and his testimony in the probate proceedings shows that he had that duty in mind when he did not immediately record the deed because he was "being overly protective of [his] elderly client." Since the probate court found that Marie did not intend to deliver the deed, a rule that imposed on Farwell an obligation to act in *Mary's* best interests would necessarily result in a breach of Farwell's duty to Marie, a classic example of divided loyalty. Of course, there is also the fact that under the rule proposed by Mary, had Farwell acted in Mary's best interests, he would have subjected himself to claims from Marie's other children. (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray, supra,* 109 Cal.App.4th at p. 1299 [not "only would the attorney be subject to potentially conflicting duties to the client and to potential beneficiaries, but counsel also could be subject to conflicting duties to different sets of beneficiaries"].)[2]

Under these circumstances, Farwell did not owe a duty to Mary, and it follows that Farwell's demurrer was properly sustained without leave to amend.

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[2] In *Moore,* the court noted that beneficiaries of "a will executed by an incompetent testator have a remedy in the probate court. They may contest the probate and challenge the will on the ground that the testator lacked testamentary capacity at the time of executing the will." (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray, supra,* 109 Cal.App.4th at p. 1300.) That is precisely what happened here.

DISPOSITION

The judgment is affirmed. Farwell is entitled to his costs of appeal.

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VOGEL, J.

We concur:

SPENCER, P.J.

MALLANO, J.